

10. Granting an AVO

- Types of AVOs
- Issuing an AVO

10.1 This chapter examines the types of AVOs that may be granted by a court, and whether the current grounds on which AVOs may be granted are satisfactory. It also looks at the adequacy of the provisions stating the circumstances in which the court *must* make an AVO, and when it *may* make an AVO.

TYPES OF AVOS

Interim orders

10.2 An interim order can be made for the period between making the complaint and the hearing. An interim order can be an ADVO or an APVO. It can be made whether or not the defendant is present, and whether or not the defendant has been given notice of the proceedings. The court may admit affidavit evidence tendered on behalf of the applicant if he or she is unable to be present, and the matter requires urgent attention.¹

10.3 If an interim order is made, the court summons the defendant to appear at a further hearing as soon as practicable after the order is made. This hearing is to decide if a final order should be made. The court may confirm, vary or revoke the interim order, whether or not the defendant appears at the further hearing.² While in force, an interim order has the same effect as a final order.³ The clerk of the court can make or extend an interim AVO where both parties consent.⁴

When does an interim order start?

10.4 A defendant cannot be found guilty of an offence of contravening an interim AVO unless he or she has been served with a copy of the order, or was present when the order was made.⁵ This means that if the defendant is present in court when an interim order is made, it is enforceable immediately. If the defendant

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1. Crimes Act s 562BB(1A)-(3).
 2. Crimes Act s 562BB(4).
 3. Crimes Act s 562BB(6).
 4. Crimes Act s 562BBA and s 562BBB, respectively.
 5. Crimes Act s 562I(2).

is not present in court when an interim order is made, it is not enforceable until the defendant is served with a copy of the order.⁶

How long does an interim order last?

10.5 There is no limitation on how long an interim AVO can last under Part 15A. It simply remains in force until it is withdrawn, dismissed or revoked, or until a final order is made.⁷

10.6 Since an interim AVO may impose significant restrictions on the defendant, the hearing should be held as soon as possible after it is made. However, interim orders may in fact last for months, or even years. This is a concern given that the defendant may not have had the opportunity to contest the order. Some jurisdictions have addressed this concern by placing time limits on the duration of interim orders.⁸

10.7 In other jurisdictions, the legislation provides for the automatic conversion of interim orders into final orders. For example, in Western Australia, the complainant elects whether the initial hearing should be held in the absence of the defendant.⁹ At the initial hearing, the court may make an interim order (up to three months) or a “cooling off” order (up to 72 hours).¹⁰ If an interim order is made, the defendant has 21 days to object, in which case the matter is set down for hearing. If there is no objection, the interim order automatically crystallises into a final

6. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_intro». See para 10.30-10.31.

7. Crimes Act s 562E(4).

8. For example, in the Australian Capital Territory, an interim order remains in force for up to 16 weeks where it is made by consent, and otherwise up to 8 weeks. It can be extended for up to 8 weeks, as long as it will not be in force for more than 16 weeks in total. A further interim order can be made only in special or exceptional circumstances: *Protection Orders Act 2001* (ACT) s 52, s 54, s 58 and s 59. In Tasmania, an interim order cannot exceed 60 days: *Justices Act 1959* (Tas) s 106D(2).

9. *Restraining Orders Act 1997* (WA) s 26.

10. Cooling off orders may not last for more than 72 hours and must be served on the defendant within 24 hours of issue: *Restraining Orders Act 1997* (WA) s 16(2).

order.¹¹ There is a presumption in favour of finalising the order, although the defendant's right to contest the order is preserved. This approach is intended to save people in need of protection from the pressure of having to pursue the matter and make unnecessary court appearances.¹²

10.8 The New Zealand model adopts a similar approach. A protection order is first issued as a "temporary order". The respondent may give notice of his or her intention to defend the order. If no such notice is given then, after three months, the order automatically becomes a final order.¹³ Research had indicated that many respondents do not defend temporary orders, and so a high proportion become final orders.¹⁴

On what grounds can the court make an interim order?

10.9 An interim order can be made "if it appears to the court that it is necessary or appropriate to do so in the circumstances".¹⁵ The legislation gives little guidance to the court on how to exercise this power. Whether an order is deemed necessary or appropriate will vary between cases and between Magistrates. Although the legislation does not refer to the urgency of the situation, some Magistrates may consider that it is only necessary or appropriate to make an interim order where danger is imminent.¹⁶

10.10 Other Australian jurisdictions employ more specific tests for granting interim orders.¹⁷ An issue for consideration in this review

11. *Restraining Orders Act 1997* (WA) s 31.

12. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) ("Model Domestic Violence Laws Report") at 107-109.

13. *Domestic Violence Act 1995* (NZ) s 76.

14. In one study, 82% of temporary orders were not defended, and 73% were converted into final orders: New Zealand, *Domestic Violence Act 1995 Process Evaluation* (New Zealand Ministry of Justice, 2000) at 67.

15. Crimes Act s 562BB(1).

16. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».

17. In the ACT, the court can make an order if "it is necessary ... to ensure the safety of the aggrieved person until the application for a

is whether it may be desirable to clarify the grounds for obtaining interim orders under Part 15A of the Crimes Act.

What terms can an interim order include?

10.11 An interim AVO “may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court”.¹⁸ The terms that can be included are the same for interim and final orders, and are discussed below at paragraph 10.26.

Issue 14

Should the legislation limit the duration of interim AVOs?

Should the grounds for an interim AVO be clarified?

Should an interim AVO automatically convert to a final order after a specified time period?

final order is decided”: *Protection Orders Act 2001* (ACT) s 49. In Queensland, a temporary order can be made “only if it appears to the court ... that an act of domestic violence has been committed against the aggrieved spouse by the respondent spouse”: *Domestic Violence (Family Protection) Act 1989* (Qld) s 39A(1). In Victoria, the court can make an interim intervention order if it is “necessary to ensure the safety of the aggrieved family member or to preserve any property of the aggrieved family member pending the hearing and determination of the complaint”: *Crimes (Family Violence) Act 1987* (Vic) s 8(1). The Tasmanian test is less precise, stating that justices may make an interim order, “if they see sufficient cause to do so”, whether or not they are satisfied of any of the matters alleged: *Justices Act 1959* (Tas) s 106D. In Western Australia, the grounds for an interim order are the same as for a final order – the court must be satisfied that, unless restrained, the respondent is “likely” to commit a personal offence against the applicant, or behave in a manner that could cause fear of such an offence. The order must also be appropriate in the circumstances: *Restraining Orders Act 1997* (WA) s 11.

18. Crimes Act s 562AE(4) and s 562AI(4).

Telephone interim orders

10.12 To ensure the safety and protection of people who experience violence, AVOs must be available at all hours. Police can apply for an interim order by telephone when it is not practicable for a court to make an immediate order because of the time or place at which the incident occurs. Telephone interim orders (“TIOs”) are available 24 hours a day. Although most are made outside court hours, TIOs are available during business hours if the police are unable to attend the court to make the complaint.¹⁹ Only police are permitted to apply for TIOs.

10.13 To apply for a TIO, the police officer attending an incident must have “good reason to believe an order is necessary to ensure the safety of the person who would be protected by the order or to prevent substantial damage to any property of that person”.²⁰ Police officers must apply for a TIO if they suspect or believe that domestic violence, stalking or child abuse “has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made,”²¹ unless the person is at least 16 years of age and intends to make the complaint themselves. Police officers need not apply if they believe there is good reason not to.²²

10.14 An application for a TIO is taken to have the same effect as any other AVO application, and is to contain a summons to the defendant to attend court for a hearing at a specified date.²³ It must be served personally on the defendant by a police officer as soon as practicable after it is made.²⁴ A TIO lasts 14 days, unless the court revokes it, makes an interim order or dismisses the

19. “Telephone” includes a radio, facsimile and any other communication device: Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».

20. Crimes Act s 562H(2).

21. Crimes Act s 562H(2A).

22. However, the officer must make a written record of the reason: Crimes Act s 562H(2B).

23. Crimes Act s 562H(5A).

24. Crimes Act s 562H(8).

application for an AVO. If the closest local court is not sitting within the 14 day period, it may be extended to 28 days.²⁵

On what grounds can the court make a TIO?

10.15 In deciding whether to make a TIO, an authorised justice need only consider whether “there are reasonable grounds for doing so”.²⁶ Presumably the authorised justice will have regard to the intention of the legislation, which is to ensure the safety and protection of persons who experience violence. In making the decision the authorised justice will have to assess the reasonableness of the police officer’s belief that an order is necessary to ensure the safety of the person or prevent substantial damage to the person’s property.²⁷

What terms can a TIO include?

10.16 A TIO states that the defendant “must not assault, molest, harass, threaten or otherwise interfere with the protected person”.²⁸ Unless otherwise ordered, it also specifies that the defendant is prohibited from intimidating or stalking the protected person.²⁹ If the police officer who applies for the order has good reason to believe the person in need of protection is in imminent danger of personal injury, the TIO can:

- prohibit or restrict the defendant from approaching that person or the person’s home, work or other premises, whether or not the defendant has a legal or equitable interest in the premises;
- prohibit or restrict the defendant from approaching the protected person or their home within 12 hours of consuming alcohol or drugs;
- prohibit the defendant from destroying or deliberately damaging or interfering with the protected person’s property.³⁰

25. Crimes Act s 562H(9) and s 562H(9A).

26. Crimes Act s 562H(3).

27. Crimes Act s 562H(2)(c).

28. Crimes Act s 562H(4).

29. Crimes Act s 562BC.

30. Crimes Act s 562H(5).

10.17 The Commission is interested to hear whether the terms of a TIO as prescribed in Part 15A are sufficient to protect against actual or threatened violence. In particular, the Commission would like to hear views on whether a TIO provides adequate protection against damage to property. As noted above, a TIO may be issued to ensure the safety of the applicant *or* prevent substantial damage to the applicant's property. Yet, the terms of a TIO may prohibit or restrict the destruction of, deliberate damage to, or interference with the applicant's property *only* where a police officer has good reason to believe the safety of the applicant is in imminent danger. This is out of step with ordinary interim and final AVOs, which may be issued where the intimidation or harassment amounts only to actual or threatened damage to property belonging to, or in the possession of, the applicant.³¹

Issue 15

Are the provisions regarding TIOs sufficient to protect people experiencing violence?

Are the grounds for and terms of TIOs adequate?

Do TIOs adequately protect against damage to the applicant's property?

Final orders

10.18 A final order can be made where both parties consent to the order, or, where the order is contested, after a hearing. As noted earlier, Part 15A does not provide for the automatic conversion of interim orders into final orders.

When does a final order start?

10.19 As with interim orders, final AVOs are not effective until the defendant has been served with a copy of the order, or was

31. Crimes Act s 562AE 3(b) and s 562AI 3(b).

present when the order was made.³² The applicant may be protected by an interim order, until the final order is served on the defendant.

How long does a final order last?

10.20 An final AVO remains in force for the period specified by the court. This is to be as long as is necessary to ensure the protection of the applicant. If no period is specified, the order remains in force for 6 months.³³

On what grounds can the court make a final order?

10.21 The court may make an AVO where the person to be protected has reasonable grounds to fear and in fact fears:

- (a) the commission by the other person of a personal violence offence against the person, or

32. Crimes Act s 562I(2).

33. Crimes Act s 562E(1)-s 562E(3). The duration of final orders differs in other jurisdictions. In the ACT, a final domestic violence order remains in force for a specified period, or 2 years if no period is specified. A longer order can be made in special or exceptional circumstances: *Protection Orders Act 2001* (ACT) s 35. A final personal protection order remains in force for a specified period, or 1 year if no period is specified: s 36. In the Northern Territory, the order remains in force for the specified period: *Domestic Violence Act 1992* (NT) s 4(1A). In Queensland, a domestic violence order remains in force for a specified period of up to 2 years. In special circumstances, the court can specify a longer period: *Domestic Violence (Family Protection) Act 1989* (Qld) s 34. In Tasmania, the order remains in force for whatever period the court considers necessary to protect the person for whose benefit the order is made: *Justices Act 1959* (Tas) s 106B(6). In Victoria, an intervention order remains in force for the period specified or, if no period is specified, until it is revoked: *Crimes (Family Violence) Act 1987* (Vic) s 6. In Western Australia, a final violence restraining order remains in force for the specified period or, if no period is specified, for 2 years: *Restraining Orders Act 1997* (WA) s 16. A misconduct restraining order is generally of a shorter duration, remaining in force for the specified period or, if no period is specified, for 12 months: s 37.

- (b) the engagement of the other person in conduct amounting to harassment or molestation of the person, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order, or
- (c) the engagement of the other person in conduct in which the other person:
 - (i) intimidates the person or a person with whom the person has a domestic relationship, or
 - (ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.³⁴

10.22 These grounds are both subjective and objective: the court must be satisfied that there are “reasonable grounds” to fear personal violence, and that the applicant does in fact fear the defendant. If the subjective element is missing, an AVO will not be granted.³⁵ There are three exceptions to this. First, where the applicant is under 16; secondly, where the applicant has a general intelligence function which is appreciably below average, or thirdly, where the defendant consents to the AVO.³⁶

10.23 The grounds for making a final order are quite broad. Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence. It also includes actual or threatened damage to property belonging to, or in possession of, the person to be protected.³⁷

10.24 While some jurisdictions use the “reasonable fear” test,³⁸ others focus on a specific act of violence and the likelihood of it

34. Crimes Act s 562AE(1) and s 562AI(1).

35. *Wallin v Tiernan* [1999] NSWCA 353.

36. Crimes Act s 562AE(2), s 562AI(2) and s 562BA. See para 10.26-10.28 for a discussion of AVOs made by consent.

37. Crimes Act s 562AE(3) and s 562AI(3).

38. South Australia also uses the “reasonable fear” test. There, the court may make a domestic violence restraining order if there is a reasonable apprehension that the defendant may, unless

happening again.³⁹ Some combine the “reasonable fear” and “specific act” tests.⁴⁰ The models which concentrate on a specific act

restrained, commit domestic violence, and the court is satisfied that the making of the order is appropriate in the circumstances. “Domestic violence” includes personal injury, damage to property, or certain other types of behaviour which reasonably arouse apprehension or fear in the family member: *Domestic Violence Act 1994* (SA) s 4. In deciding whether to make an order, the court must consider, as factors of primary importance, the need to ensure family members are protected from domestic violence and the welfare of any children affected. It must also have regard to the accommodation needs of family members, any relevant family contact order, how a restraining order would affect contact, any hardship that may be caused, the income and assets of the defendant, any other legal proceedings between the parties and any other matter which is relevant in the circumstances of the case: s 6.

39. In the ACT, the court need only be satisfied that the respondent has engaged in domestic violence before making an order. In the case of personal violence, the court must be satisfied that the respondent has engaged in personal violence towards the aggrieved person and may do so again: *Protection Orders Act 2001* (ACT) s 40. Domestic and personal violence include physical injury, damage to property, threats, harassment and offensive behaviour. Domestic violence also includes certain “domestic violence offences”: s 9 and s 10. In Queensland, the court can make a domestic violence order if it is satisfied that the respondent has committed domestic violence against the aggrieved spouse, and is likely to again: *Domestic Violence (Family Protection) Act 1989* (Qld) s 20. “Domestic violence” includes wilful injury, property damage, intimidation or harassment, indecent behaviour or a threat to commit any of these: s 11. In Tasmania, the court must be satisfied that a person has caused personal injury or property damage, or has behaved in a provocative or offensive manner, and is likely to do so again. Restraint orders are also available for stalking: *Justices Act 1959* (Tas) s 106B(1). In Victoria, the court may make an intervention order if it is satisfied that the person has assaulted, threatened, harassed, molested or behaved in an offensive manner towards a family member or damaged his or her property, and is likely to do so again: *Crimes (Family Violence) Act 1987* (Vic) s 4.
40. In Western Australia, the court may make a violence restraining order if it is satisfied that, unless restrained, the respondent is likely to commit a personal offence against the applicant, or behave

of violence focus more on the objective conduct of the respondent and less on the subjective perceptions of the applicant. This test has been criticised because it requires the applicant to have suffered violence before an order will be granted.⁴¹ However, where the definition of violence is broad, and includes threats, intimidation and harassment, there is no requirement that physical violence occur before an order will be granted. The “specific act” test has also been criticised where it demands the applicant show the behaviour “is likely” to happen again before an order will be granted.⁴² This additional requirement may deny protection to those where violence is not “likely” but is still a real possibility.⁴³

10.25 Although Part 15A focuses on “reasonable fear” rather than specific acts, applicants do give evidence of specific acts of violence in order to satisfy the court they have reasonable grounds to fear and in fact fear violence. In practice, there is considerable overlap between the different approaches. However, the “reasonable fear”

in a manner that could cause fear that of such an offence. Granting a violence restraining order must also be appropriate in the circumstances: *Restraining Orders Act 1997* (WA) s 11. The court may make a misconduct restraining order if it is satisfied that the respondent is likely to behave in a manner that is intimidating or offensive to the applicant, cause damage to property in the applicant’s possession or behave in a manner that breaches the peace. Granting a misconduct restraining order must also be appropriate in the circumstances: s 34. The Northern Territory also has a mixed test. The court may make a restraining order where it is satisfied that the defendant has assaulted, caused personal injury or damaged property and is likely to do so again, or has threatened to assault, cause personal injury or damage property and is likely to repeat or carry out the threat. The court may also make an order where the defendant has behaved in a provocative or offensive manner and the behaviour is likely to lead to a breach of the peace, including behaviour that may cause reasonable fear of violence or harassment: *Domestic Violence Act 1992* (NT) s 4(1).

41. R Hunter and J Stubbs, “Model Laws or Missed Opportunity?” (1999) 24(1) *Alternative Law Journal* 3.

42. *Domestic Violence (Family Protection) Act 1989* (Qld) s 20, *Justices Act 1959* (Tas) s 106B(1), *Crimes (Family Violence) Act 1987* (Vic) s 4.

43. Model Domestic Violence Laws Report at 65.

test may be easier to satisfy because evidence of behaviour beyond threats, intimidation and acts of violence may give rise to reasonable fear, for example evidence that the respondent has an explosive temper and is skilled in martial arts.⁴⁴

What terms can a final order include?

10.26 A final order “may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable”.⁴⁵ Unless otherwise ordered, every AVO prohibits the defendant from intimidating or stalking the protected person.⁴⁶ An order can prohibit the defendant from approaching that person or the person’s home, work or other premises. It can prohibit or restrict any specified behaviour which might affect the protected person. It can also prohibit the possession of firearms.⁴⁷

Issue 16

Is the default duration of 6 months for a final order appropriate?

Are the grounds for a final order adequate?

Should the criteria in the legislation for obtaining an AVO be more specific? If so, how?

How workable and effective are the prohibitions and restrictions that may be included in an AVO?

Orders made by consent

10.27 A court can make an AVO without being satisfied that the complainant has reasonable grounds to fear and in fact fears domestic or personal violence, if both parties consent to the making

44. Model Domestic Violence Laws Report at 59.

45. Crimes Act s 562AE(4) and s 562AI(4).

46. Crimes Act s 562BC.

47. Crimes Act s 562D(1).

of the order. By consenting to the order, the defendant does not admit to any of the particulars of the complaint. Where the parties consent, the court can only conduct a hearing if the order is a final order and it is in the interests of justice to do so.⁴⁸

10.28 Both interim and final orders can be made by consent. The clerk of the court can make or extend an interim order where both parties consent.⁴⁹ However, only the court can make a final order.⁵⁰ One issue to be considered is whether the clerk of the court should be able to issue final AVOs where both parties consent.

10.29 Granting AVOs by consent is expedient as the matter does not have to proceed to a final hearing. Also, the applicant benefits from immediate protection without having to wait for the order to be served on the defendant. However, there is the risk of parties not understanding all the consequences that will flow from an AVO.

Issue 17

Are the provisions allowing for AVOs to be made with the consent of both parties operating fairly and effectively?

Should clerks of the court be able to issue final AVOs by consent?

Ex parte orders

10.30 When an initial complaint is made, the defendant is served with a copy of the complaint and a summons to attend court at a particular date and time. If the defendant is present when an order is made, the clerk will serve a copy of the order personally on the defendant, or can arrange for the order to be sent by post. If the

48. Crimes Act s 562BA.

49. Crimes Act s 562BBA and s 562BBB.

50. Crimes Act s 562BA.

defendant does not attend court, an order can be made *ex parte*. A copy of the order is then served on the defendant by a police officer or such other person as the clerk thinks fit. Service can be affected in other manners, “as the court directs”.⁵¹

10.31 Service is important because defendants cannot be charged with contravention of an AVO unless they have been served with a copy of the order. An AVO does not afford any protection until it has been served on the defendant. If the defendant cannot be located, the order provides no protection, even if the defendant knows of its existence. This can be a problem, especially in regional areas, for example if the defendant leaves for long periods of time for work.

Issue 18

Are the current provisions relating to service effective?

Standard orders

10.32 While courts have total discretion as to the terms of an interim or final AVO, they tend to rely on standard order forms which contain a checklist of commonly used terms.⁵² The Local Courts Practice and Procedure Manual states that the use of standard orders promotes consistency and efficiency, and clarifies the order for the parties, court staff and police. Reliance on standard orders means police records are easier to maintain and orders are easier to enforce. Importantly, Magistrates still have the option of tailoring orders to the circumstances of each case.⁵³

51. Crimes Act s 562J.

52. See Appendix A.

53. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_intro».

10.33 The standard orders were written following consultation with Magistrates, lawyers and domestic violence agencies. However, they are not contained in the legislation, and may vary from court to court. For the sake of consistency, it may be desirable to include the standard orders in a schedule to the AVO legislation, or prescribe them by regulation. The Commission seeks views on this matter.

Issue 19

Are the standard orders adequate? If not, how should they be revised?

Should the standard orders be incorporated as a schedule to the AVO legislation?

ISSUING AN AVO

10.34 The legislation states that, if the grounds for making an order are satisfied, the court “may” make an AVO.⁵⁴ In relation to APVO proceedings, the court has a broader discretion to refuse to issue process.⁵⁵ In some circumstances, the court “must” make an order.⁵⁶ Whether a court will make an order may also depend on whether or not bail is granted.

When must the court make an AVO?

10.35 The court must make an AVO when a defendant pleads guilty to, or is found guilty of, a domestic violence offence or an offence involving intimidation or stalking.⁵⁷ Similarly, a court must

54. Crimes Act s 562AE(1) and s 562AI(1).

55. Crimes Act s 562AK. See para 5.24-5.28 for a discussion of the discretion to refuse to issue APVOs.

56. Crimes Act s 562BE and s 562BF.

57. Crimes Act s 562BE(1).

make an interim AVO when a person is charged with one of those offences.⁵⁸ In these cases the court must make the order unless it is not required, for example because an order has already been made or because the person in need of protection opposes the making of the order.⁵⁹

When can the court choose whether or not to make an AVO?

10.36 Part 15A provides that, on complaint, a court “may” make an AVO.⁶⁰ In deciding whether or not to make an order, the court is required to consider certain factors. If the order is going to prohibit or restrict access to the defendant’s residence, the court must consider:

- (a) the accommodation needs of all relevant parties, and
- (b) the effect of making an order on any children living or ordinarily living at the residence, and
- (c) the consequences for the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made.⁶¹

10.37 A person who applies for, or applies to vary, an AVO must inform the court of any relevant family law contact order, or any application for such an order that may be pending.⁶² In deciding whether to make or vary an AVO, the court must:

- (a) consider whether contact between the protected person, or between the defendant, and any child of either of those persons is relevant to the making or variation of the order, and

58. Crimes Act s 562BF(1).

59. Crimes Act s 562BE(2) and s 546BF(3).

60. Crimes Act s 562AE(1) and s 562AI(1).

61. Crimes Act s 562D(2).

62. Crimes Act s 562FA(1).

- (b) have regard to any relevant family contact order of which the court has been informed.⁶³

10.38 The legislation in some other jurisdictions is more prescriptive, giving the courts more structured guidance.⁶⁴

63. Crimes Act s 562FA(2).

64. For example, the ACT legislation states that the paramount consideration in deciding whether to make a protection order is the need to ensure that the aggrieved person is protected from domestic or personal violence: *Protection Orders Act 2001* (ACT) s 6(1)(a). The court must also consider the welfare of children who may be affected by the defendant's behaviour, the accommodation needs of the aggrieved person and any children, any hardship that may be caused by the making of the order, the income and assets of the defendant and aggrieved person, whether contact between the aggrieved person or the defendant and any child of either of them is relevant, any previous domestic or personal violence committed by the defendant, any previous protection orders and any previous contraventions, the need to ensure property is protected from damage, and anything else that is relevant: s 41. A protection order must be as unrestrictive on the personal rights and liberties of the defendant as possible, while still achieving the objects of the Act: s 6(2). In South Australia, the court must consider, as factors of primary importance, the need to ensure family members are protected from domestic violence and the welfare of any children affected. It must also have regard to the accommodation needs of family members, any relevant family contact order, how a restraining order would affect contact, any hardship that may be caused, the income and assets of the defendant, any other legal proceedings between the parties and any other matter which is relevant in the circumstances of the case: *Domestic Violence Act 1994* (SA) s 6. In Western Australia, the court must consider, as matters of primary importance in violence restraining order proceedings, the need to ensure the applicant is protected from personal violence, the need to prevent behaviour that causes fear of personal violence and the welfare of any children affected. It must also consider the accommodation needs of the parties, any hardship that may be caused, any family orders, any other current legal proceedings between the parties, the defendant's criminal record, any previous similar behaviour and any other relevant matters: *Restraining Orders Act 1997* (WA) s 12. In Tasmania, the

Issue 20

Are the circumstances in which the court must make an AVO appropriate?

Should the legislation be more specific about the factors the court must consider before making an order?

Should the legislation indicate how the factors should be weighted?

Should different factors be listed for consideration in applications for interim, telephone interim and final orders?

paramount consideration is the protection and welfare of the person for whose benefit the order is sought. The court must also consider any relevant family contact order, and whether access between the parties and any child who is a member of the family of either party is relevant to the making of the order: *Justices Act 1959 (Tas)* s 106B(4AAB).

